Eric Lau Man Hing v Eramara Jaya Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING PETITION NO D–1–26–26 OF 1996
SELVENTHIRANATHAN J
9 APRIL 1998

Companies and Corporations — *Winding up — Oppression — Minority shareholders excluded from day to day administration of company — Irregular financial transactions — Whether oppressive, discriminatory and prejudicial conduct by majority shareholders*

The petitioner filed a petition against the respondents pursuant to s 181 of the Companies Act 1965. The petitioner was a minority shareholder in the first respondent company ('the company') holding 30% of its shares as the nominee of one Madam Soh and her family ('the minority shareholders'). The second respondent held the balance 70% of the shares as the nominee of the third respondent ('the majority shareholders'). The minority shareholders' grievances were, inter alia: (i) the third respondent had taken full and effective control of the company although it had been agreed that the minority shareholders would be in charge of site and administrative matters. The majority shareholders had also come to control the company's fund totally with the appointment of the third respondent's brother who was neither a director nor a shareholder of the company as the third signatory to the company cheques; (ii) there had been irregular financial transactions by the majority shareholders, for instance the loan to Wijaya Kancing Sdn Bhd which was not entitled to loans from the company; (iii) the third respondent and his brother had withdrawn substantial funds from the company and deposited the same in fixed deposit accounts in their individual or joint names; and (iv) there had not been any payment of dividends by the company despite the substantial profits made by the company. The petitioner submitted that there was an undeniable case of oppression and disregard by the majority shareholders of the minority shareholders' interest.

Held, allowing the petition:

(1) The grievances of the minority shareholders looked at in totality amounted to oppressive, discriminatory and prejudicial conduct by the majority shareholders. There was no doubt that the minority shareholders were excluded from the day to day administration of the company. In this respect, oppression would be found where a shareholder who was entitled to manage the company was excluded from the scope of management (see pp 532D–E, 533A–B).

(2) The financial transactions in question were irregular and amounted to oppression practised on the minority shareholders. The loans to Wijaya Kancing had not been consented to by the minority shareholders. Apart from a mere averment that the

minority shareholders gave their consent, the third respondent did not exhibit any document to support his allegation as to his consent. The loans were not for the benefit of, and were unconnected with, the company (see p 533C–D).

(3) In so far as the fixed deposits were concerned, the opening of accounts in the third respondent's and his brother's names and the depositing of the company's monies in those accounts instead of in the company's own accounts was an act prima facie prejudicial to the interests of the minority shareholders (see p 534C–D).

[Bahasa Malaysia summary

Pempetisyen telah memfailkan petisyen terhadap responden-reponden menurut s 181 Akta Syarikat 1965. Pempetisyen merupakan pemegang saham minoriti di dalam syarikat responden ('syarikat tersebut') dan memegang 30% saham-saham sebagai penerima namaan kepada Pn Soh dan keluarganya ('pemegang saham minoriti'). Responden kedua pula memegang baki 70% saham-saham sebagai penerima namaan responden ketiga ('pemegang saham majoriti tersebut'). Rungutan-rungutan pemegang saham minoriti adalah, antara lain: (i) responden ketiga telah mengawal secara sepenuh dan berkesan syarikat tersebut walaupun adalah dipersetujui bahawa pemegang-pemegang saham minoriti akan menguruskan tapak dan urusan pentadbiran. Pemegang-pemegang saham majoriti juga telah mengawal secara sepenuhnya wang syarikat dengan pelantikan abang responden ketiga yang bukan seorang pengarah atau pemegang saham syarikat responden tersebut sebagai penandatangan ketiga kepada cek-cek syarikat; (ii) terdapat transaksi kewangan yang menyimpang dari kebiasaan, sebagai contoh pinjaman kepada Wijaya Kancing Sdn Bhd yang tidak berhak untuk mendapatkan pinjaman-pinjaman daripada syarikat tersebut; (iii) responden ketiga dan juga abangnya telah mengeluarkan wang yang banyak daripada syarikat dan telah menyimpannya di dalam akaun simpanan tetap di dalam nama persendirian atau nama bersama; dan (iv) tidak terdapat pembayaran dividen-dividen oleh syarikat walaupun keuntungan syarikat adalah besar. Pempetisyen berhujah bahawa terdapat kes penindasan dan juga tindakan tidak mempedulikan oleh pemegang-pemegang saham majoriti terhadap kepentingan pemegang-pemegang saham minoriti yang tidak boleh dipertikaikan.

Diputuskan, membenarkan petisyen:

(1) Rungutan-rungutan pemegang-pemegang saham minoriti jika dilihat secara keseluruhan adalah terjumlah kepada tindakan penindasan, mendiskriminasi dan memprejudis oleh pemegang-pemegang saham majoriti. Tidak dapat diragukan bahawa pemegang-pemegang saham minoriti telah dikecualikan daripada pentadbiran harian syarikat. Berkenaan dengan ini, penindasan

akan didapati di mana seorang pemegang saham yang berhak untuk mengurus syarikat tersebut telah dikecualikan daripada skop pengurusan (lihat ms 532D–E, 533A–B).

(2) Transaksi-transaksi kewangan yang dipersoalkan adalah menyimpang dari biasa dan terjumlah kepada penindasan terhadap pemegang-pemegang saham minoriti. Pinjaman kepada Wijaya Kancing belum dipersetujui oleh pemegang-pemegang saham minoriti. Selain daripada penegasan sahaja bahawa pemegang saham minoriti telah memberikan persetujuan, responden ketiga tidak mengemukakan sebarang dokumen untuk menyokong pengataannya berkenaan persetujuan tersebut. Pinjaman-pinjaman tersebut bukanlah untuk faedah, dan tiada kaitan dengan, syarikat tersebut (lihat ms 533C–E).

(3) Berkenaan dengan simpanan-simpanan tetap, pembukaan akuan-akaun di dalam nama responden ketiga dan juga abangnya dan menyimpan wang syarikat di dalam akaun-akaun tersebut dan bukannya di dalam akaun-akaun syarikat adalah suatu tindakan memprejudiskan kepentingan pemegang-pemegang saham minoriti secara prima facie (lihat ms 534C–D).]

Notes

For cases on winding up generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 618–918.

Cases referred to

Company, Re A [1983] Ch 178 (refd)
Chiew Sze Sun & Anor v Cast Iron Products Sdn Bhd & Ors[1994] 1 CLJ 157 (refd)
Coliseum Stand Car Service Ltd Abdul Khalik v Mohamed Jee & Ors, Re [1972] 1 MLJ 109 (refd)
Elder v Elder & Watson Ltd [1952] SC 49 (refd)
HR Harmer Ltd, Re [1958] 3 All ER 689 (refd)
Jaya Medical Consultants Sdn Bhd v Island & Peninsular Bhd & Ors [1994] 1 MLJ 520 (refd)

Legislation referred to

Companies Act 1965 s 181

Wong Chong Wah (*Lim Koon Huan* with him) (*Skrine & Co*) for the petitioner.

Surinder Singh (*Vickneswary Manickam* with him) (*V Manickam & Partners*) for the respondents.

Selventhiranathan J: The petition in encl (1) was filed by the petitioner pursuant to s 181 of the Companies Act 1965 ('the Act') and supported by his affidavit in encl (2).

A It is claimed that the petitioner is a minority shareholder in the first respondent company ('the company'), holding 30% of its shares as the nominee of one Madam Soh Goon Wah ('Madam Soh') and her family ('the minority shareholders'). The second respondent is a registered shareholder of the company holding the balance 70% of the shares as the nominee of the third respondent ('the majority shareholders'). It was B further stated that the third respondent is the general manager of the company, having sole and full control and management over it. The company is involved in a housing development project known as Phases 1 and 2 Happy Court, Taman Kepong, Kuala Lumpur. Phase 1 has been completed but phase 2 has not commenced. This is the only project in C which the company is involved.

The minority shareholders' grievances were, inter alia, as follows:

(a) The third respondent had taken full and effective control of the company although it had been agreed that the minority shareholders would be in charge of site and administrative matters while the D majority shareholders would be in charge of technical matters, this being a joint-venture partnership (paras 13 to 17 and 21 to 23 of encl (2)).

The majority shareholders had also come to control the company's funds totally, ie 100%, with the appointment of one Lim Seng Heng (the third respondent's brother), who was neither a director nor E shareholder of the company, as the third signatory to the company's cheques, the other two signatories being the third respondent and Madam Soh.

(b) There had been irregular financial transactions by the majority shareholders purportedly on behalf of the company as follows:

F (i) between September 1992 and December 1993, they had granted temporary loans of RM1,648,000 to Wijaya Kancing Sdn Bhd ('Wijaya Kancing'), a contractor of the company, which was not entitled to loans from the company (paras 37 to 39 of encl (2));

(ii) on 1 December 1995 they paid RM988,000 to a company called G Syarikat Kong Loy Construction Sdn Bhd ('Kong Loy') which never had had any business dealings with the company but which was owned by the third respondent's father-in-law (paras 40 to 43 of encl (2));

(iii) on 25 July 1996 they made payment of RM273,000 to one Liew Ching Poh Construction ('LCPC') when LCPC had only H demanded RM257,357 for construction works done (paras 44 to 46 of encl (2)).

(c) The third respondent and his brother had withdrawn substantial funds from the company and deposited the same in fixed deposit accounts in their individual or joint names (para 36 of encl (2)).

I (d) The third respondent set up a new company called Code Brilliant Sdn Bhd in July 1996 to which the company had disposed of certain lands, ie lots 686–729, on which the proposed Phase 2 of Happy Court was

going to be developed, for RM500,000 without the knowledge and consent of the minority shareholders. The said lots had been valued in 1990 at approximately RM965,000 and the company had spent RM630,000 for the rezoning premium. The estimated profits from the sale of Phase 2 was RM10,843,124.63 (paras 30 to 35 and 47 to 49 of encl (2)).

(e) There had not been any payment of dividends by the company despite the substantial profits made from the sale of Phase 1 and substantial cash of more than RM5,000,000 held by the company (para 56 of encl (2)).

Counsel for the petitioner submitted that, on the facts as stated in the abovementioned grievances, there was an undeniable case of oppression and disregard by the majority shareholders of the minority shareholders' interests.

Counsel for the respondents, on the other hand, submitted that no evidence of oppression had been shown. The money invested by the petitioner in the company had in fact increased from the original investment and there was evidence that the affairs of the company had been conducted in a manner beneficial to all the shareholders. Counsel further submitted that there had been no acts which were unfairly discriminatory of, or otherwise prejudicial to, the petitioner.

However, it is my view that the grievances of the minority shareholders, looked at in totality amount to oppressive, discriminatory and prejudicial conduct by the majority shareholders.

Jenkins LJ in *Re HR Harmer Ltd* [1958] 3 All ER 689 at p 700 of the report of that case cited with approval the following pronouncement of the Lord President, Lord Cooper, in *Elder v Elder & Watson Ltd* [1952] SC 49 in an appeal from Scotland to the House of Lords:

> ... the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely. ...

Siti Norma Yaakob J (as she then was, and now JCA) in the case of *Jaya Medical Consultants Sdn Bhd v Island & Peninsular Bhd & Ors* [1994] 1 MLJ 520 stated at pp 536–537 of the report of that case that the concept of unfair discrimination or prejudice enables the court to take into consideration not only the rights of the members under the company's constitution but also their legitimate expectations arising from agreements and understanding of the members among themselves.

The minority shareholders contended by this petition that it was a term in the joint-venture partnership between them and the majority that the minority would be in charge of the site and administrative matters, while the majority would be in charge of technical matters, relating to the project. The third respondent did not specifically deny that there was this arrangement or agreement, and in fact admitted taking 100% charge and control of the company (paras 6 to 8 of encl (16).

Applying the principles of law enunciated in the two cases cited above to the facts of this case, there was no doubt in my mind that the minority shareholders were excluded from the day-to-day administration of the company, especially in matters relating to its finances with the appointment of the third respondent's brother as the third signatory to the company's cheques.

In this respect I agreed with counsel for the petitioner who submitted that oppression would be found where a shareholder who was entitled to manage the company was excluded from the scope of management: *Malaysian and Singapore Company Law & Practice* (CCH Asia Ltd) at p 4352 para 31–340, based on the authority of *Re A Company* [1983] Ch 178.

The respondents also admitted to all the monies having been paid out by the company as per the grievances of the minority shareholders as stated above, but contended that the same was regularly made.

With respect, I was of the view that the financial transactions in question were irregular and amounted to oppression practised on the minority shareholders for the reasons which follow.

The loans to Wijaya Kancing had not been consented to by the minority shareholders. Apart from a mere averment that the minority shareholders gave their consent, the third respondent did not exhibit any document to support his allegation as to the consent. The loans were not for the benefit of, and were unconnected with, the company. In *Re Coliseum Stand Car Service Ltd Abdul Khalik v Mohamed Jee & Ors* [1972] 1 MLJ 109, Abdul Hamid J (as he then was and who subsequently became the Lord President of the Supreme Court) said at p 112 of the report of that case as follows:

> As regards the two loans, one to himself and the other to his son, although it would appear that they had been repaid, there is nothing to show that these loans were made for the benefit of the company. To my mind it constituted an improper use of the company's funds. It was quite improper for the company, controlled entirely by the first respondent, to authorise the use of the company's funds for a purpose unconnected with the company's affairs.

The sum of RM988,000 paid to Kong Loy was said to be payment of dividends to the majority shareholders. There was no evidence to support this claim as Kong Loy was not even a shareholder of the company.

This payment therefore was clearly a departure from the standards of fair dealing and in isolation of the conditions of fair play because there was no corresponding payment of dividends to the minority shareholders. Although the third respondent tried to contend otherwise in his affidavit (at para 20 of encl (22)) by averring that the sum of RM450,000 was the corresponding payment of dividends to the minority shareholders, the fact of the matter is that this payment was made to a company called Lim Ee Beng Trading Sdn Bhd ('Lim Ee Beng') in respect of earthworks done (exh 'P-2' to encl (16)). Again the payment to Lim Ee Beng was in 1993, whereas that to Kong Loy was in 1995, hence further demolishing the contention that these two payments were payments of dividends. If so, why

were they paid in different years? A question also arose as to why those dividends which were paid, if indeed they were dividends, were not specifically labelled and recorded as such in the company's records. A

The payment of RM273,000 which had been made to LCPC was said to be in respect of monies payable to LCPC with interest. The third respondent, however, did not adduce any evidence to show how the interest became due, how the amount was arrived at, and why such payment had to be made when in the first place the third respondent himself had said that there were no monies due to LCPC, and when LCPC itself had only demanded for RM257,357 (paras 44 and 45 and exh 'P-23' of encl (2)). The payment of such monies from the company's funds without documents to support and justify the same was an act clearly prejudicial to the minority shareholders. B C

Insofar as the fixed deposits were concerned, in my view, the opening of accounts in the third respondent's and his brother's names and the depositing of the company's monies in those accounts instead of in the company's own accounts was an act prima facie prejudicial to the interests of the minority shareholders. The reason put forth by the third respondent that he so deposited the company's monies to enable interest to be earned was a hollow argument, not at all tenable or satisfactory in the absence of any evidence to show that the depositing of the monies in the company's own accounts would not have earned any interest. D

As regards the sale of Lots 686-729, despite the third respondent's contention that the sale was not proceeded with upon the minority shareholders' objection, the third respondent had not sufficiently rebutted the minority shareholders' allegations of the unauthorized sale, in particular, the sale of those lots in 1993 to one Chin Man and the payment of RM8,240 by the company for the registration fee on the 'transfer of 46 titles, registration fee for the withdrawal of caveat(s) lodged on 44 titles and payment of agent's fees' (paras 30 to 35 of encl (2)). E F

On the non-payment of dividends, in spite of the averment by the third respondent that the minority shareholders were paid dividends of RM450,000 on 15 January 1993 (para 34 of encl (16)), the exhibit of the purported payment does not support the same as it relates to payment for earthworks carried out by Lim Ee Beng on phase 1 of the company's project. Hence the minority shareholders' grievance as to the non-payment of dividends was not baseless. By the third respondent's own admission (paras 5 and 6 of encl (17)), it was also clear that the majority shareholders had failed to keep proper accounts for the company by virtue of the third respondent's uncontroverted statement that the respondents needed an extension of time to file an affidavit in opposition to the petition which was necessitated by their need for time to gather (the accounts) and prepare the statement of accounts and other documents. G H

In *Chiew Sze Sun & Anor v Cast Iron Products Sdn Bhd & Ors*[1994] 1 CLJ 157, the petitioners' complaints were, inter alia, that no proper accounts of the respondent company in question were being kept and that no dividends had been paid. Zakaria Yatim J (as he then was, and now FCJ) I

held that this amounted to the affairs of the respondent company being conducted, and the powers of the other respondents being exercised, in a manner oppressive to and in disregard of the interests of the petitioners which constituted sufficient grounds to grant the orders sought under s 181 of the Act.

In view of the foregoing and since the respondents had not challenged the valuation of the shares by the petitioner, I could see no reason why the petition should not be allowed. In the circumstances, I made orders as follows and as prayed for at sub-paras (1)(a), (2), (3), (4), (5) and (7) of para 63 of encl (1):

(1) (a) that the second and third respondents be ordered to purchase the petitioner's 30% shareholding in the company for the price of RM3,514,527.15;

(b) ... (not granted, as in the alternative);

(2) that the second and third respondents be ordered to pay to the petitioner the sum of RM3,514,527.15 or damages to be assessed with interest at 8% per annum, or at such rate this court deems fit, to date of full payment;

(3) that the first respondent be ordered to pay to the petitioner the sum of RM1,595,300;

(4) that the third respondent do, within seven days of the order of this court, give full account and disclosure of the funds of the company held in FDRs registered in the name(s) of the third respondent and other third parties;

(5) that the second and third respondents do, within seven days of the order of this court, give full account and disclosure of the financial transactions by the company from 15 September 1990 to the date of the order of this court;

(6) ...

(7) that the costs of this application be paid to the petitioner by the second and third respondents.

The parties were also given liberty to apply to court for consequential orders.

Order accordingly.

Reported by Jafisah Jaafar